

REMARKS

Claims 1-53 remain in the application with Claims 1, 26 and 51 being independent.

The Examiner rejected Claims 1-53 under 35 U.S.C. § 112, second paragraph, as being indefinite. The Examiner specifically pointed to Claims 1, 25, and 26 as including the recitation "positive water content" and stated that the Examiner was unsure what the Applicants meant by this language. The actual phrase reads "a positive water content of up to 40% by weight". In Claims 1 and 26 this phrase refers to the water content of the outer casing material, and in Claim 25 it refers to the water content of the first filling material and the second filling material. In all three claims what is meant by the language is that there is a water content of greater than 0% up to 40%. Thus, the outer casing and filling materials are not dry. This is conventional language used to indicate that the range of a particular item is something greater than zero to an upper maximum limit, in this case, 40%. Applicants submit that given the explanation, the language is not indefinite and Applicants respectfully request that the Examiner withdraw this rejection.

Applicants wish to thank the Examiner for noting that Claim 6 included the repetition of a number of ingredients, by the present amendment the repeated ingredients have been removed, therefore, the scope of Claim 6 has not been altered by this amendment, rather a typographical error has been removed.

The Examiner further suggests that Claims 4, 6, 8-23, and 29-47, have language that the Examiner does not understand. Specifically, the Examiner questions whether Applicants intend for a Markush group by use of the language ". . . comprises at least one of . . . or mixtures thereof". The Examiner suggests that if a Markush group is intended the proper language is

“selected from the group consisting of”. Applicants agree with the Examiner that if a Markush group were intended then the Examiner’s suggested language would be correct, however, Applicants do not intend a Markush group by the language in the above-referenced claims. The language in the above-referenced claims is merely meant to convey that the particular item discussed in the claim such as the filling material, the bicarbonate, leavening acid, etc., comprises at least one of the listed more specific species or a mixture of these specific species but at least one of them. Applicants submit that the language is not confusing and, therefore, Applicants request that the Examiner remove this rejection of Claims 4, 6, 8-23, and 29-47.

The Examiner has rejected Claims 1-53 under 35 U.S.C. § 103(a) as being unpatentable over *Bauman, et al.* in view of *Herting*. The Examiner admits “Bauman, et al. disclosed a fully baked or fried multi-layered toaster product. The product comprises a first layer, a second layer, and a filling in between of the two layers. The second layer can be a batter-type product such as waffle batter, pancake batter.” The Examiner admits that *Bauman, et al.* does not disclose the water activity of the waffle layer or the water activity of the filling. *Bauman, et al.* also does not disclose the formulations for the filling or the waffle layer as claimed in the present application. The Examiner points to *Herting* as disclosing in the background section a typical formulation for waffle batter comprising “water, 38.93% wheat flour, .78% soy flour, .51% sugar, .30% lecithin, .16% baking soda, .08% salt and .78% peanut oil”. *Herting* also fails to disclose or suggest a water activity level for the waffle batter.

The Examiner’s rejection of Claims 1-53 under 35 U.S.C. § 103(a) based on *Bauman, et al.* in view of *Herting* cannot be sustained upon a review of the cited references.

Claim 1 of the present application recites "A baked and freezer stable filled waffle comprising". The products disclosed in *Bauman, et al.* and *Herting* are not freezer stable filled waffles as required by Claim 1. What *Bauman, et al.* discloses is specifically a multi-layer toaster product that comprises a first layer and a second layer wherein the first and second layers are constructed of dissimilar materials. *Bauman, et al.* does disclose the possibility of having a filling layer located between the first and second layers of the product. The Examiner is directed to the abstract; Column 2, Lines 20-30; Column 2, Lines 54-59; and Column 4, Lines 20-40. *Bauman et al.* specifically teaches a multi-layer product wherein the two layers are made from dissimilar materials. The product disclosed in *Bauman, et al.* specifically requires that the first layer be a structural layer capable of supporting both a filling layer and the second layer which is specifically a non-structural layer such as a waffle batter. *Herting* discloses a conventional non-filled waffle with an external pattern on the waffle.

Claim 1 further requires "an outer casing material formed from a batter comprising a homogenous mixture of from 30 to 65% by weight water, from 25 to 70% by weight of a flour, from 0.05 to 5% by weight of a bicarbonate and from 0.04 to 2% by weight of a leavening acid; said outer casing material surrounding a filling material". The product disclosed in *Bauman, et al.* does not have such an outer casing material that is a homogenous mixture. *Bauman, et al.* specifically teaches the utilization of two layers that are dissimilar from each other wherein neither one of the layers surrounds the filling material. Thus, *Bauman et al.* teaches away from the present invention wherein a homogeneous outer casing

material surrounds the filling material. This teaching is clear from the disclosure of *Bauman, et al.* and all of the figures enclosed in *Bauman, et al.* As discussed above, *Herting* also fails to disclose a filled waffle.

Finally, Claim 1 requires that the water content in the filling material be less than the water content in the outer casing material and that the outer casing material have a water activity level of from 0.9 to 0.99 while the filling material have a water activity level of less than or equal to 0.95 with the water activity level of the filling material being less than the water activity level of the outer casing material. The Examiner admits that neither of the cited references have any disclosure of either the water content or the water activity level of any fillings or outer layers. *Bauman, et al.* specifically teaches away from the product claimed in Claim 1 wherein the outer casing material is a homogenous mixture of a specifically disclosed waffle batter. There is no disclosure in either of the references of a baked and freezer stable filled waffle as required by Claim 1. Even when the references are combined, at most the Examiner can provide the product of *Bauman, et al.* with a very specific waffle batter composition derived from *Herting* for the second layer of *Bauman, et al.* Even when combined, *Bauman, et al.* and *Herting* do not disclose the product claimed in Claim 1.

The Examiner goes on to say that although there is no disclosure in either of the cited references of the water activity levels of either the filling or the outer casing material "it would have been obvious to one skilled in the art to formulate the filling to have a lower water content and therefore a lower water activity than the outer waffle layer so as to prevent

migration from the filling to the outer layer during storage". The Examiner points to no teaching in either reference for this obviousness determination, and this is inappropriate. The Examiner is inappropriately using the Applicants' own invention to suggest that the Applicants' invention is obvious.

A review of the baked and freezer stable products other than Applicants' invention currently available shows why Applicants' invention is inventive. Other baked freezer stable products include things such as pot pies, fruit pies, and thawable fruit pies. In all cases, these products universally have an outer casing material that has a much **lower** water activity level and water content than the filling material. Typically, the outer casing of these products is a crust having a water content of less than 30% and often 10% or less. The fillings include meat, fruit, and vegetables. These components typically have a water content of greater than 80%, giving the overall filling a water content of 50% or greater. To be freezer stable and baked these all teach the use of a dry crust with a high water content filling. Thus, one of ordinary skill in the art would be lead to do to the opposite of what Applicants have done in the present invention given the state of knowledge of baked and freezer stable products.

The Examiner proceeds from the analysis of *Bauman, et al.* in combination with *Herting* of Claim 1 to dismiss without explanation Claims 2-25 as merely being obvious or typical. These conclusory statements on the part of the Examiner are an inappropriate analysis of the claims.

In summary, Claim 1 includes numerous limitations neither disclosed in nor made obvious by *Bauman, et al.* in combination with *Herting*. Therefore, the rejection of Claim 1,

and the claims which depend therefrom, under 35 U.S.C. § 103(a) based on *Bauman, et al.* in view of *Herting* is improper and must be withdrawn.

The Examiner also rejected independent Claim 26 based on *Bauman, et al.* in view of *Herting*. Independent Claim 26 is similar to independent Claim 1 with the additional limitations that the filling material includes from 35 to 80% by weight sweeteners and from 0.5 to 50% by weight fruit source. Therefore, the analysis with respect to Claim 1 of the cited references applies equally to Claim 26 with the further caveat that neither of the cited references disclosed a filling material having from 35 to 80% by weight sweeteners and from .5 to 50% by weight of a fruit source. Therefore, the rejection of Claim 26, and the claims which depend therefrom, under 35 U.S.C. § 103(a) based on *Bauman, et al.* and *Herting* is improper and must be withdrawn.

Independent Claim 51 is similar to independent Claim 1 with the additional limitations that the filling material is "formed from a mixture of a sweet flavored filling comprising from 1 to 40% by weight water, from 25 to 80% by weight sweetener, from 0.5 to 5% by weight starch, from 0.1 to 3% by weight gum, and from 0.01 to 5% by weight flavoring". As discussed above with respect to Claim 1, the cited references of *Bauman, et al.* and *Herting* fail to disclose numerous limitations found within Claim 51 as described above with respect to Claim 1. In addition, neither of the references alone or in combination disclose a filling material having the characteristics required by Claim 51. Therefore, the rejection of Claim 51, and the claims which depend therefrom, under 35 U.S.C. § 103(a) based on *Bauman, et al.* and *Herting* is improper and must be withdrawn.

Applicants' attorney respectfully submits that the claims as amended are now in condition for allowance and respectfully requests such allowance.

Respectfully submitted,

HOWARD & HOWARD ATTORNEYS

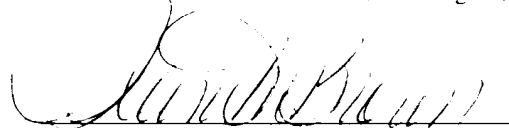
November 11, 2002
Date

A handwritten signature in dark ink, appearing to read "Randall L. Shoemaker", is written over a horizontal line.

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I hereby certify that this paper or fee is being deposited with the United States Postal Service as First Class Mail, postage prepaid, in an envelope addressed to the Assistant Commissioner of Patents, Washington, D.C. 20231, on **November 12, 2002**.



Irene M. Brown

MARKED UP VERSION

6. (Amended) A filled waffle as recited in Claim 5, wherein said filling material comprises at least one of cheese, tomato, [tomato and] herbs, tomato sauce, vegetables, cheese and vegetable combinations, [a cheese, tomato, tomato and herbs, tomato sauce, vegetables, cheese and vegetable combinations,] bacon, ham, pork sausage, beef sausage, meat analogs, or mixtures thereof.